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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 NATHAN WALLACE,

12 Petitioner,

13 v.

14 L. SMALL, Warden

15 Respondent.

Civil No. 09-0372 L (WMc)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254.

18 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

19 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma
20 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
21 qualified to proceed in forma pauperis. See Rule 3(a), 28 U.S.C. foll. § 2254.

22 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

23 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
24 has failed to allege that his state court conviction or sentence violates the Constitution of the
25 United States.

26 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
27 federal habeas corpus claims:

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1 The Supreme Court, a Justice thereof, a circuit judge, or a district
 2 court shall entertain an application for a writ of habeas corpus in
 3 behalf of a person in custody pursuant to the judgment of a State
 court only on the ground that he is in custody in violation of the
 Constitution or laws or treaties of the United States.

4 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
 5 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
 6 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
 7 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
 8 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
 9 United States.” See 28 U.S.C. § 2254(a).

10 Here, Petitioner claims that he “is being duped out of his interest rate percentages the
 11 money in his account earns in breach of legal authority and the shareholder contract established
 12 by CDCR” and “CDCR stole Petitioner’s tax rebate checks sent to him by the IRS”. (Pet. at 5.)
 13 In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or
 14 treaties of the United States.” 28 U.S.C. § 2254.

15 Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal
 16 habeas claim and then refile the amended petition in this case. He must exhaust state judicial
 17 remedies before bringing his claims via federal habeas. State prisoners who wish to challenge
 18 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
 19 Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
 20 California state prisoner must present the California Supreme Court with a fair opportunity to
 21 rule on the merits of every issue raised in his or her federal habeas petition. See 28 U.S.C.
 22 § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial
 23 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
 24 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
 25 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
 26 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
 27 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 28 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due

1 process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal
2 court, but in state court.” Id. (emphasis added).

3 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
4 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
5 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
6 to the judgment of a State court. The limitation period shall run from the latest of:

7 (A) the date on which the judgment became final by the
8 conclusion of direct review or the expiration of the time for seeking
such review;

9 (B) the date on which the impediment to filing an application
10 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
11 by such State action;

12 (C) the date on which the constitutional right asserted was
initially recognized by the Supreme Court, if the right has been
13 newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or
15 claims presented could have been discovered through the exercise
of due diligence.

16 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

17 The Court also notes that the statute of limitations does not run while a properly filed state
18 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003,
19 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4,
20 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
21 the appropriate court officer for placement into the record] are in compliance with the applicable
22 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
23 limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167,
24 181-82 (2001).

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1 **CONCLUSION AND ORDER**

2 Accordingly, the Court **DISMISSES** the case without prejudice for Petitioner's failure
3 to satisfy the filing fee requirement and state a cognizable federal claim. If Petitioner wishes to
4 proceed with this case, he must submit, **no later than May 5, 2009**, a copy of this Order with
5 the \$5.00 fee or with adequate proof of his inability to pay the fee AND a First Amended
6 Petition which cures the pleading deficiencies noted above. **The Clerk of Court is directed to**
7 **send a blank Southern District of California In Forma Pauperis Application to Petitioner**
8 **and a blank First Amended Petition form along with a copy of this Order.**

9 **IT IS SO ORDERED.**

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11 **DATED: March 4, 2009**

12 
13 **M. James Lorenz**
14 **United States District Court Judge**